

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1391

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES,

Plaintiff-Appellee,

-VS-

Docket #74-1391

THOMAS BELL,

Defendant-Appellant

BRIEF FOR DEFENDANT-APPELLANT

Appeal from judgment of conviction in the
United States District Court for the Western
District of New York.

DAVID M. BROWN, ESQ.
Attorney for Defendant-Appellant
Office & P.O. Address
700 Liberty Bank Building
Buffalo, New York 14202



JAECKLE, FLEISCHMANN & MUGEL
ATTORNEYS AT LAW
700 LIBERTY BANK BUILDING, BUFFALO, NEW YORK 14202

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PRELIMINARY STATEMENT

On October 16, 1973, appellant, Thomas Bell, was indicted in the United States District Court for the Western District of New York for attempted bank robbery in violation of Title 18, United States Code, Section 2113(a). That indictment charged that appellant did, on October 11, 1973, attempt to obtain certain funds from the Marine Midland Bank--Western, Main-Chippewa Office, Buffalo, New York, by force, violence and intimidation. Following hearing and denial of appellant's motions to suppress certain identification testimony, a trial was held before the Honorable John T. Curtin and a jury commencing February 11, 1974. That trial concluded February 22, 1974, with a finding of guilty.

Following denial by the Trial Court of post-verdict motions, appellant was remanded to the custody of the Attorney General for study pursuant to Title 18, United States Code, Section 4208(b) and a judgment of conviction entered. It is from that judgment that this appeal is now taken.

STATEMENT OF FACTS

A. PROSECUTION'S CASE:

On October 11, 1973 at approximately 3:50 P.M., a Negro male approached a teller's cage in the Marine Midland Bank on Main and Chippewa Streets in the City of Buffalo. He handed

a note, written on a bank withdrawal slip, to the teller, Geraldine Schmid. The note read "Give me your money or I'll kill you." Mrs. Schmid, and one other teller, Sandra Witmer, than left the teller's cage with the note and advised the Assistant Manager of what had just occurred. The Assistant Manager then called the Buffalo Police and advised that an attempted robbery was in progress. During this time, the black male who had originally handed Mrs. Schmid the note, left the bank premises. When the bank manager hung up the phone, he went to the front door of the bank and saw an individual coming out of a store doorway about three or four doors to the right of the bank. That individual was walking very slowly and nonchalantly. The Assistant Manager then called Mrs. Schmid to the front door and asked her "Is that the guy?" Mrs. Schmid responded that it was. At that point, the police arrived on motorcycles and the Assistant Manager lost sight of the individual previously pointed out by Mrs. Schmid.

A few minutes later, one of the Buffalo motorcycle officers observed the defendant, Thomas Bell, standing in a doorway of a tavern on Franklin Street which was approximately a block and a half from the location of the Marine Midland Bank in question. The officer asked the defendant to step down from the doorway which he did. The defendant was then taken to the Marine Midland Bank where he entered. As he walked through the

door, the defendant was flanked by two uniformed Buffalo motorcycle officers. At this point, Mrs. Schmid and Miss Witmer were asked whether they could identify the defendant as the man who had previously presented the note in question and she responded affirmatively. The defendant was then taken to the Buffalo Police Headquarters in Buffalo.

At approximately 4:30 P.M. on that same date, Special Agent Kruger of the Federal Bureau of Investigation arrived at the Buffalo Police Headquarters and obtained the "holdup note" from a Lieutenant of Detectives. Agent Kruger then took the note and proceeded to question the defendant who was seated at a table outside the Lieutenant's office. The defendant denied any complicity in the attempted holdup, was shown the holdup note and denied writing it, and also gave various handwriting samples to Agent Kruger. The questioning of the defendant by Agent Kruger terminated at approximately 6 P.M.

Subsequently, Agent Kruger forwarded the "holdup note" together with the various handwriting samples given by the defendant to the laboratories of the Federal Bureau of Investigation in Washington, D.C. The report of the handwriting analysis was delivered to Agent Kruger but was not offered in evidence by the Government upon this trial. However, evidence was introduced that the only fingerprints found upon the "holdup note" were those of the defendant, Thomas Bell. No testimony

was offered concerning the custody or possession of this "holdup note" from the time it was first handed to Mrs. Schmid during the course of the attempted robbery until Special Agent Kruger received it from the Lieutenant of Detectives in the Buffalo Police Headquarters.

At the trial of this action, Mrs. Schmid was unable at first to identify the defendant as the perpetrator of the attempted robbery. It was only after she left the witness stand and approached counsel's table that the identification was made.

The second bank teller, Sandra Witmer, was ill at the time of trial and the Government read her testimony, taken at an earlier hearing, to the jury. This was done over objection of defense counsel. In that testimony, Miss Witmer identified defendant as the perpetrator of the attempted bank robbery.

B. DEFENDANT'S CASE:

Dr. Michael J. Lynch, a diplomat of the American Board of Psychiatry and Neurology and a practicing psychiatrist in the Western New York area, testified that he had conducted psychiatric examinations of defendant on three occasions subsequent to his arrest on October 11, 1973. He further testified that he had reviewed records from the State of New York Department of Mental Hygiene, Buffalo State Hospital, pertaining to various hospitalizations of the defendant at that institution. He also had reviewed various records of the Meyer Memorial Hospital in Buffalo, New York. The hospitalization of the defendant at those various institutions

began in 1966 and continued up to and including the year 1972. The defendant was first under Dr. Lynch's care in 1966. At that time, Dr. Lynch was Chief of the Psychiatric and Forensic Medicine Department of the Meyer Memorial Hospital where the defendant was a patient. Dr. Lynch then proceeded to review the various records of the defendant's psychiatric treatment at the above two institutions and pointed out that he had previously been diagnosed as schizophrenia, undifferentiated type in 1969 and schizophrenia, catatonic type in 1972.

Dr. Lynch further testified concerning his review of the medical records of the Erie County Holding Center where the defendant had been confined since October 11, 1973 and testified that the defendant had been on anti-psychotic drugs since that time at the direction of the medical personnel of that facility. Dr. Lynch further testified that defendant had received numerous electric convulsive therapy treatments at the Buffalo State Hospital in 1972 for his psychotic condition.

Based on the foregoing information, Dr. Lynch testified that it was his opinion that on October 11, 1973, the defendant was suffering from a mental disease or defect which resulted in the defendant's lack of substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

C. GOVERNMENT'S REBUTTAL:

Dr. Richard Miller, a practicing psychiatrist, was called as a rebuttal witness on behalf of the Government and testified that he had reviewed the various medical records of Buffalo State Hospital and Meyer Memorial Hospital and had further examined the defendant for one hour on February 14, 1974. Dr. Miller also testified that he had reviewed the defendant's prior arrest record. Prior to this time, no mention had been made of an arrest record of the defendant and accordingly, an objection by defense counsel was made to that testimony. Dr. Miller then read to the jury a letter dated April 23, 1970 from the Acting Director of the Buffalo State Hospital to the Director of the Department of Psychiatry at the Meyer Memorial Hospital. The reading of that letter was over objection of defense counsel. The contents of that letter as read to the jury appear on pages 222 through 226 of the transcript of trial. Among other things, that letter referred to the "potentiality for getting into difficulties" of the defendant, prior use by defendant of heroin, amphetamines and marijuana, thefts of household articles, a robbery and mugging claimed to have been perpetrated by defendant while a patient at Buffalo State Hospital, the probability of the defendant's returning to drug use in the future, and the opinion that the defendant's psychiatric symptomatology is probably false. Following the reading of that letter by Dr. Miller to the jury, a motion for mistrial

was made by counsel for defendant and denied by the Court.

Dr. Miller concluded his testimony by offering his opinion that the defendant was suffering from a mental disease on October 11, 1973 but that the defendant did not lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

The Government next called as a rebuttal witness Melvin Caver, Senior Counselor with the Buffalo General Hospital Community Health Center. Mr. Caver testified that the defendant had been under his supervision from May to September of 1973. Mr. Caver testified that during the first month of his observation the defendant was nervous and exhibited paranoia. He was then seen by a psychiatrist who prescribed various tranquilizers three times a day. Thereafter, his behavior improved greatly and he was able to communicate. Mr. Caver further testified that he had reviewed the records of the Buffalo State Hospital in 1972 and found a long history of psychiatric diagnosis of schizophrenia with respect to the defendant Thomas Bell.

APPEAL POINTS

I. Defendant's motion for a mistrial following the testimony of the Government's psychiatrist was improperly denied.

II. The reading of the prior testimony of Sandra Witmer was prejudicial error.

III. There was insufficient evidence to sustain a finding of guilty beyond a reasonable doubt.

ARGUMENT

POINT I

DEFENDANT'S MOTION FOR A MISTRIAL
FOLLOWING TESTIMONY OF THE
GOVERNMENT'S PSYCHIATRIST WAS
IMPROPERLY DENIED.

It is a well recognized rule of law that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, is inadmissible. Faust vs. United States, 163 U.S. 452, 41 L.ed. 224, 16 S.Ct. 1112. That the admission of such evidence of prior criminal activity on the part of a defendant constitutes error was recently recognized by this Circuit in United States vs. Kohlman, 469 F.2d 247 (1972). The Court in that case, however, held that such error was harmless since defense counsel had relied on the defendant's prior arrest record to support his insanity defense. In that case the Court pointed out that the defendant's counsel had elicited through the use of its own psychiatrists the prior arrest record of the defendant, his repeated anti-social conduct, prior assaults, destruction of property, drunkenness and other evidence for the purpose of establishing a substantial lack of capacity to conform his

conduct to the requirements of law. 469 F.2d at 250, 251.

That however is not the case here.

In the present case, defense counsel expressly pointed out to the Court, prior to presenting the defense of insanity, that various records from the Buffalo State Hospital and the Meyer Memorial Hospital would be marked for identification but not introduced into evidence. It was further pointed out to the Court at that time that those records contained many references to a long line of criminal activity on the part of the defendant. Defense counsel further pointed out that he would introduce no evidence concerning this prior criminal activity on the part of the defendant and that he would ask the Government to do likewise. This preliminary statement is contained at page 140-141 of the transcript of trial proceedings. Thereafter, Dr. Michael Lynch, on behalf of the defendant, testified as to his opinion concerning the defendant's insanity at the time of the commission of the alleged attempted bank robbery in question. At no time was any mention made of the defendant's prior criminal record or other criminal activities.

The first reference to criminal activity on the part of the defendant came in the form of a statement by the Government's psychiatrist that he had reviewed defendant's past

arrest record. Following objection to this testimony, Dr. Miller then went on to read at length from a letter dated April 23, 1970 from the Acting Director of the Buffalo State Hospital to the Director of the Department of Psychiatry at the Meyer Memorial Hospital. During the course of that reading, the jury was advised not only that the defendant "has a potentiality for getting into difficulties and uses his past medical history to avoid prosecution" but in addition, the jury was further advised that the defendant had been taking illegal drugs for at least the past six years including heroin, marijuana and various amphetamines. Dr. Miller then went on to advise the jury that the defendant had been guilty of various thefts of household furniture, warrants had been issued for his arrest, that he had participated in robberies and muggings while a patient at the Buffalo State Hospital, and that it was probable that the defendant would return to drug use in the future. The doctor further advised the jury that various state hospitals had occasions to write to Judges of the various local courts in Buffalo concerning the defendant Thomas Bell. Not being satisfied with the damage already done, Dr. Miller further went on to read to the jury from an opinion of a Mr. Henry H. Haines wherein Mr. Haines concluded that whatever psychiatric symptomatology that the defendant exhibited was "probably false", was "only on a transient basis", and

"did not interfere with his understanding of his conduct and its illegal nature". What medical background, if any, Mr. Haines had was not related to the jury nor was defendant afforded any opportunity whatsoever to either cross-examine or rebut these "opinions" of Mr. Haines.

Following this testimony from Dr. Miller, a motion for a mis-trial was made and denied by the Court. It is respectfully submitted to this Court that not only was the testimony of Dr. Miller error but it was the most prejudicial type of error imagineable. Not only was the jury told that defendant had a pre-disposition for robberies, muggings, thefts, drug use and other criminal activity, but the jury was further told that the defendant had, in fact, engaged in these various activities and further that he would "probably" engage in the same activities in the future. The jury was further advised that in the opinion of Mr. Henry Haines, whose background and qualifications were never even mentioned, that the defendant was a malingerer, a fraud and a fake, such opinion was not in the form of a medical diagnosis, was not made by any competent medical doctor, and was completely contrary to six years of psychiatric treatment received by the defendant at the two leading psychiatric facilities within the City of Buffalo. The defendant respectfully submits to this Court that the denial of his motion for a mistrial was

prejudicial error as a matter of law.

POINT II

THE READING OF THE PRIOR TESTIMONY
OF SANDRA WITMER WAS PREJUDICIAL
ERROR.

Sandra Witmer, a bank teller and one of only two eyewitnesses to the attempted holdup, testified at a pre-trial suppression hearing in this action. However, at the time of trial, the Government represented that Miss Witmer was ill and could not attend the proceedings at that time. Accordingly the Government requested permission that they be allowed to read her testimony. Over objection of defense counsel, that permission was granted. Through the reading of her testimony, Miss Witmer identified the defendant as the perpetrator of the attempted bank robbery in question.

The leading case on the area of the use of prior testimony of an absent witness in a court proceeding is Mattox vs. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.ed. 409 (1895). In that case, the Supreme Court reviewed the Sixth Amendment right of any accused to be confronted with the witnesses against him. In defining and commenting upon this most basic right of any defendant in a criminal case, the Supreme Court noted that one object of that constitutional provision was to give to the accused an opportunity to compel

the witness "to stand face to face with the jury in order that they may look at him, judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

It is that basic right to confront the witness upon whose testimony the jury is being asked to convict that the defendant was deprived of in this action. Miss Witmer was not dead, not beyond the reach of process, nor was there any evidence that she was permanently incapacitated from testifying upon a trial of the action. She was simply unavailable because of some temporary illness which made it more convenient for the Government to use her prior testimony. In such a case, it is well recognized that the convenience to the Government must give way to the rights of the accused. Indeed it was specifically such a consideration that prompted the Court in Peterson vs. United States, 344 F.2d 419, (1965) to reverse a conviction. In that case, a witness was unavailable at the time of trial because of pregnancy. For that reason, the Government was permitted by the Trial Court to use her prior testimony. In commenting upon that error, that Circuit Court observed the following:

"Mrs. Flora was not dead, beyond the reach of process nor permanently incapacitated. She was simply unavailable at the time of trial because of her pregnancy. Considering the seriousness of the charge and if

the Government desired to use Mrs. Flora's testimony, it should have requested a continuance to a time when she could probably be present.... For the error in admitting the testimony of Mrs. Flora at the former trial, the judgments of conviction must be reversed." 344 F.2d at 425.

This observation is again summarized in 29 Am. Jur. 2d, Evidence Section 754, page 824 where the following observation is made:

"In criminal prosecutions, according to most of the courts, the mere temporary illness or disability of a witness is not sufficient to justify the reception of his former testimony; it must appear that the witness is in such a state, either mentally or physically, that in reasonable probability he will never be able to attend the trial."

One of the major issues on the trial of the present action was the identity of the accused. The defendant contended at all times that he had not perpetrated the attempted robbery in question. The testimony of Miss Witmer, which was read to the jury, was completely contrary to the defendant's position. Miss Witmer identified Thomas Bell as the perpetrator of the attempted robbery on October 11, 1973. The only other witness called by the Government on the question of identification was Mrs. Schmid who was unable to identify defendant as the perpetrator of the robbery from the witness stand. It is respectfully submitted to this Court that the introduction

of Miss Witmer was error and that error was prejudicial to defendant.

POINT III

THERE WAS INSUFFICIENT EVIDENCE TO
SUSTAIN A FINDING OF GUILTY BEYOND
A REASONABLE DOUBT.

Defendant Thomas Bell had been confined to psychiatric hospitals at various times and for various durations from at least the year 1966 until shortly before the attempted robbery in question. Throughout that period of hospitalization, competent medical personnel had diagnosed Thomas Bell as suffering from various forms of mental illness under the general category of schizophrenia. Indeed, as late as 1972, the defendant had received a series of electric convulsive therapy treatments for his psychotic condition at the Buffalo State Hospital (trial transcript p. 188). Moreover, during his pre-trial confinement, he was placed on major anti-psychotic drugs by medical personnel of the local holding center (trial transcript p. 186). Furthermore, the Government's own witness testified that psychiatrists had prescribed additional anti-psychotic drugs for the defendant just one month prior to the commission of the attempted bank robbery charged in the present indictment (trial transcript p. 275-276). Even the Government's own psychiatrist

conceded that the defendant was suffering from a mental disease on October 11, 1973, the date charged in the present indictment. (trial transcript p. 232) When questioned as to the effect of such mental disease, Dr. Miller concluded that defendant "either cannot or does not regard the usual social milieu in terms of the standards of behavior and the moral standards of the particular community that that person lives in". (trial transcript p. 233)

This characterization by Dr. Miller of the mental disease of the defendant on October 11, 1973 is basically the test for insanity as set forth by this Court in United States vs. Freeman, 357 F.2d 606 (2nd. Cir. 1966).

If the defendant cannot regard his behavior by the same moral or behavioral standards of the particular community in which he lives, then the defendant basically lacks the capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. This is precisely the conclusion reached by Dr. Michael Lynch who had examined the defendant on numerous occasions beginning in 1966.

It is respectfully submitted to this Court that in view of the over seven years of psychiatric history of the defendant, the repeated diagnosis of a psychotic condition, the continued treatment of the defendant for that psychosis

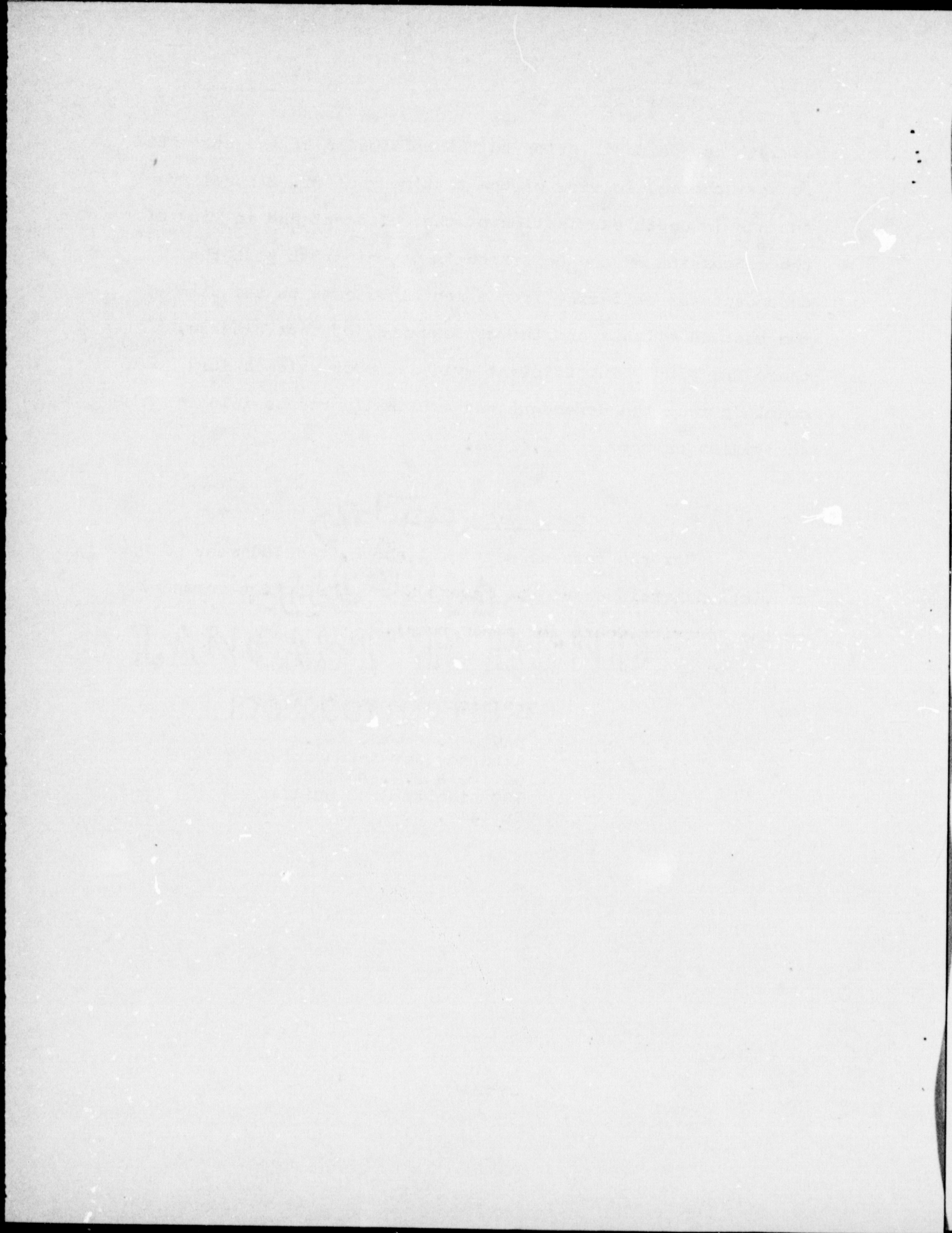
as late as one month prior to the commission of the attempted robbery charge, in view of the testimony of Dr. Michael Lynch and his in depth examination of the defendant and in view of the concession by the Government's psychiatrist that the defendant was suffering from a mental disease on the date of the charged offense and the consequences of that disease, there was simply insufficient evidence upon which a jury could conclude that the defendant was criminally responsible for his activities on October 11, 1973.

CONCLUSION

For the reasons set forth above, the judgment of conviction herein should be reversed and the action remanded to the District Court for a new trial.

Respectfully submitted,

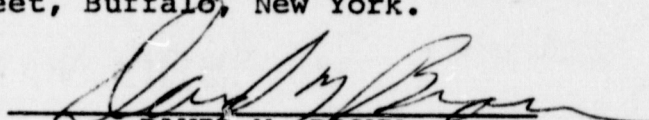
DAVID M. BROWN, ESQ.
Attorney for Defendant-Appellant
Office & P.O. Address
700 Liberty Bank Building
Buffalo, New York 14202



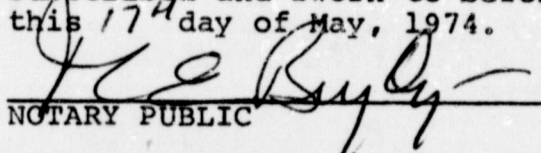
CERTIFICATE OF SERVICE

DAVID M. BROWN, being duly sworn, deposes and says:

That on May 17, 1974, he served three copies of the foregoing Brief and accompanying Appendix on the United States Attorney for the Western District of New York by delivering the same to his office in the United States Courthouse, 68 Court Street, Buffalo, New York.


DAVID M. BROWN

Subscribed and sworn to before me
this 17th day of May, 1974.


NOTARY PUBLIC

THOMAS E. BRYDGES
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 19, 2005